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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 134

DREXEL & CO., and others,
Petitioners,

v.

GEORGE HALL and others,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners, defendants in this action under Section 11 of the Securities Act of 1933 (15 USC § 77k), pray that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Second Circuit holding

(1) that the limitation in Section 13 of that Act (15 USC § 77m), barring any "action . . . brought" more than one year from the time the alleged misrepresentation was or should have been discovered, does not present any bar where the security-purchaser asserts his claim by the device of intervention in an existing "class" action rather than by bringing an independent action; and

(2) that the bringing of a "spurious" class action under Rule 23(a)(3) by nine purchasers of an issue

of securities effected a tolling of the one-year statute of limitations as to all other security-purchasers.

The Court allowed intervention by 25 new plaintiffs one and one-half years or more after the alleged misrepresentations should have been discovered by them, as indicated by commencement of the original action, and in doing so reversed the order of the United States District Court for the Southern District of New York which had held the intervenors barred by the statute of limitations.

Opinions Below

The opinion of the Court of Appeals is reported at 340 F.2d 731 and is set forth herein as Appendix A. The unreported opinion of the District Court is set forth as Appendix B. The denials of rehearing are set forth herein as Appendices C and D.

Jurisdiction

The order of the Court of Appeals reversing the District Court was entered January 18 1965. The orders denying rehearing were entered February 15 1965. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Questions Presented

1. Can the one-year limitation provision of Securities Act § 13 (barring any action brought more than one year after the misrepresentation is or should have been discovered) be properly construed as allowing without limit of time the assertion of security-purchasers'

causes of action by way of intervention in a "spurious" class action brought by other security-holders?

2. In view of the prohibition in 28 USC § 2072 against allowing the rules of procedure to abridge substantive rights, can Civil Rule 23(a)(3) be properly construed as creating a tolling of limitations imposed by Securities Act § 13, with the effect of granting all security-holders, once any member of the class has filed suit, an option for an indefinite period thereafter as to whether they will or will not sue?

Statutes and Rule Involved

SECTION 13 OF THE SECURITIES ACT OF 1933, TITLE 15, UNITED STATES CODE, SECTION 77m

"§ 77m. *Limitation of actions*

No action shall be maintained to enforce any liability created under section 77k or 771(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 771(1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 77k or 771(1) of this title more than three years after the security was bona fide offered to the public, or under section 771(2) of this title more than three years after the sale."

TITLE 28, UNITED STATES CODE, SECTION 2072

"§ 2072. *Rules of civil procedure for district courts*

The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court."

RULE 23(a), FEDERAL RULES OF CIVIL PROCEDURE

"Rule 23. *Class Actions*

(a) *Representation.* If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

Sections 11 and 22 of the Securities Act of 1933 (15 USC §§ 77k and 77v) are set out herein as Appendix E.

Statement

The suit, brought under Section 11 of the Securities Act of 1933 (15 USC § 77k), charges that a false and misleading registration statement was filed by petitioners on May 16 1961 in connection with a $3,500,000 convertible subordinated debenture issue of BarChris Construction Corporation. The action was commenced October 25 1962 by nine plaintiffs suing "on behalf of themselves and in a representative capacity on behalf of all other present and former holders of 5½% subordinated debentures (due May 1 1976) of the BarChris Construction Corporation, similarly situated".

There is no evidence that other security-holders were associated in any way with the nine or that the nine had any authority to represent any security-purchasers other than themselves. Two interventions were granted on consent subject to all defenses on February 13 1963 and May 1 1963,

respectively. These interventions added 18 new plaintiffs and brought the damages sought to a total of $469,661.75.

On May 13 1964, one and a half years after the commencement of the action and two days short of three years from the time the securities were offered to the public, 25 proposed new plaintiffs sought leave to intervene and to serve a third amended complaint. These proposed intervenors sought damages in the amount of $61,552.85.

The proposed third amended complaint (18a)[1] omitted the essential allegation that the intervenors had not discovered or should not have discovered the alleged misrepresentation within one year before the date of the motion to intervene. Any such allegation would have been untrue. There had been a filing in bankruptcy by BarChris 19 months prior to the intervenors' motion and notices had been given by the indenture trustee to the debenture-holders at about the same time (33a). Information about the commencement of the original action, about the charges made herein and about the opportunity to join herein at a seasonable time had been available to all prospective intervenors during this entire period. Other debenture-holders had taken action to intervene more than a year before the motion made by these twenty-five.

The District Court (Sylvester J. Ryan C.J.) held that, even though the suit had been commenced as a class suit under Rule 23(a)(3), it had been brought to enforce several rights and each plaintiff must be able to avoid the bar of the limitation based on his knowledge without reference to the other suits filed or the knowledge of the other suitors. He denied the motion unless the proposed new plaintiffs should file an amended complaint alleging that none of them discovered or should have discovered the fraud more than a year prior to their motion to intervene (as required by

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[1]References are to Appellants' Appendix in the Court below.

the statute). No such amendment was made. Accordingly an order was entered denying the motion to intervene (4a).

The Court of Appeals reversed. The majority opinion (Hays and Marshall JJ) held that under a "literal reading of the statute" the requirements are satisfied since an "action" here was brought within the statutory period and the assertion of the claims of the intervenors did not involve the bringing of an "action" by them. The opinion also took the view that in order to

> "give full recognition to the representative character of the action we must hold that the statute of limitations is tolled for those in whose behalf the representative action is brought as well as for those who actually bring the action." (340 F.2d at 733; App. A p. 5)

In a concurring opinion, Judge Friendly, while disagreeing with most of the reasons advanced by the majority and indicating that the question was one of some difficulty, went along with the majority's interpretation of the word "action" as not applying to *interventions*.

Reasons for Granting the Writ

The decision of the Court below would, if allowed to stand, accomplish what Chief Judge Ryan warned of as "an abrogation of the statutory one-year limitation" (App. B p. 13). The Court below has used a procedural rule—Civil Rule 23(a)(3)—to inject into § 13 the notion of an indefinite tolling of limitations which goes into effect at the moment any handful of security-purchasers file a complaint containing a class action allegation. The ruling below means that each time such a complaint is filed the bulk of the purchasers of any issue of securities will have not merely

the statutory one-year period from date of discovery within which to sue, but two, three, four or more years during which they can ride along, neither suing nor barred from suit, while the action of the original plaintiffs is pending. This scheme, created by the Court below in order to give "full recognition" to a procedural rule, bears little resemblance to what Congress enacted as the result of its careful attention to the limitation question both at the time of the original passage of the Securities Act and at the time of the amendment of that Act in 1934.

Moreover, this drastic alteration in the statutory plan is based upon a misconstruction of the purpose and effect of Rule 23(a)(3). A so-called "class action" under this rule is merely a congeries of separate suits, the only unifying element being common questions of law or fact. Members of the class may sue or not as they wish and no one is bound by the action unless he actually joins. There is nothing in Rule 23(a)(3), or in the accepted interpretation of the rule, which warrants the creation of a "tolling" effect which so drastically alters the substantive rights and obligations created by the limitation provision in § 13. Indeed the interpretation given by the Court below to this rule would result in a most serious violation of the Civil Rule Enabling Act (28 USC § 2072) which commands that the rules shall not abridge or modify substantive rights.

Since the Federal and State courts have concurrent jurisdiction of causes of action under the Securities Act of 1933 (15 USC § 77v, App. E p. 23) the use of a procedural rule to toll the § 13 limitation must necessarily destroy uniformity of application with respect to the limitation in the Federal and among the several State jurisdictions.

This Court has recently emphasized its special responsibility for reviewing questions under the Federal Rules of

Civil Procedure, which the Court is charged with formulating and putting into effect. *Schlagenhauf* v. *Holder*, 379 US 104 (1964). The fact that the Advisory Committee on the Civil Rules has under consideration a revision of Rule 23 (34 FRD 385, noted by the Court of Appeals 340 F.2d at 736), is not a reason against but rather an added argument for certiorari so that the relationship of the Rules and statute-created rights may be examined in a context of actual problems rather than as an abstraction. Professor Moore has noted the Court's preference to allow points to be decided in litigated cases rather than to try to resolve them generally by *ex parte* action. 3 Moore's *Federal Practice* p. 3501.

Thus the decision below raises questions of real importance, which this Court should settle, in the application of limitations under the Securities Act of 1933 (involving the over-all three-year limit as well as the one-year limit) and in the application of the Civil Rules.

Argument

I

IN THE DECISION BELOW THE COURT OF APPEALS HAS ABROGATED THE LIMITATIONS WRITTEN BY CONGRESS INTO § 13.

The Court of Appeals has misinterpreted both the language and the underlying purpose of § 13 in holding that the filing of a "spurious" class action by a handful of security purchasers excuses all the rest of such purchasers from compliance with the statute of limitations. The Court has *not* held that the filing of the class action made the whole class of security purchasers parties to the action. Causes of action under the Securities Act are entirely separate and independent and no investor can be compulsorily joined

with others by a class action allegation or otherwise. Regardless of the bringing of a class suit, the individual investor has no action and his claim is not presented for adjudication until he actually intervenes.[2]

What the Court below has held is that the filing of action by the nine original plaintiffs satisfied the one-year limitation in § 13 as to all the rest of the debenture purchasers because this initial filing put defendants on notice of the "possibility of claims" amounting to the full $3,500,000 sale price of the debentures (340 F. 2d at 734, App. A p. 6).

This theory that mere notice of the possibility of claims, rather than the actual initiation of legal action, can satisfy a statute of limitations is an astonishing departure from established law. The justification found by the Court was two-fold—(1) that the phrase "action . . . brought", used by Congress in § 13 to describe what is barred after the one-year period, does not apply to interventions; and (2) that the limitation period fixed by the Congress should be tolled in order to "give full recognition" to Civil Rule 23 (340 F. 2d at 733, App. A p. 5).

(a) The Language of § 13 Cannot Properly be Construed as Allowing Investors to Assert Claims By Intervention Without Limit of Time

The one-year limitation in § 13 is:

> "No action shall be maintained to enforce any liability created under section 77k or 771(2) of this

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[2]The Second Circuit Court of Appeals presumably still recognizes it as "the settled rule" that persons who do not become parties to a spurious class suit cannot be affected by the decision. A. N. Hand Cir. J. in *Oppenheimer* v. *F. J. Young & Co.* 144 F.2d 387, 390. That Court recognizes a Rule 23(a)(3) suit as distinguishable "from the truly representative actions". Clark Cir. J. in *Nagler* v. *Admiral Corp.* 248 F.2d 319, 327; see also *All American Airways, Inc.* v. *Elderd* 209 F.2d 247, 248 (Clark Cir. J.); 3 Moore *Federal Practice* pp. 3442-3, 3465-8 (1964).

> title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence . . . ."

This provision, fairly read, requires nothing less than that the individual security purchaser must bring *his* action to recover within the one-year period from the time of *his* discovery or duty to discover. The statute does not indicate in any way that mere notice of the possibility of claims constitutes compliance. Nor does the statute permit any inference that the application of the statutory bar is to fluctuate in accordance with the formula used to initiate legal action.

Thus the Court's interpretation of the phrase "action . . . brought" as not applying to interventions is unrealistic. Both in fact and in law the motion in the present case of the 25 new plaintiffs to intervene was the bringing of *their* action. This was a new action; until intervention they had no action. Since this intervention occurred more than one year after the alleged misrepresentations were or should have been discovered, the intervention was as to these new plaintiffs an "action . . . brought" *after* the expiration of the prescribed period.

The legislative history makes it doubly clear that Congress intended the one-year statute to be a requirement of diligence on the part of each security holder to make *his* claim in court within one year after discovery or be barred. The limitation provisions in § 13 were originally two years after discovery with an over-all limitation of ten years. These time periods brought numerous protests resulting in the amendment of § 13 in 1934.

The one-year discovery provision which was ultimately adopted was passed as an amendment to the Senate bill,

after considerable discussion on the Senate floor. Senator Fletcher, the sponsor of the amendment, stated (78 Cong. Rec. 8198):

> "Mr. President, the thought was that a man ought not to delay suit more than 1 year after he discovers the fraud. If he has been injured and finds that he has been injured, he ought to bring *his* action within a reasonable time, and we fix that time at 1 year.
>
> . . . . .
>
> I think the Senator will agree that where a representation is made as to a security and a man buys it and finds the representation was false and that he was misled as to material facts and was damaged and had suffered a loss, *he* ought to act within 1 year after he makes the discovery." (emphasis added)

Senator Barkley made several statements to the same effect. For instance he explained (*ibid.*):

> "But if within that time [the proposed absolute 5-year period] he makes discovery of fraud and damage, then he is required to bring *his* suit within 1 year after such discovery." (emphasis added)

Senator Barkley emphasized that the purpose of the one-year statute was to limit the possibility of litigation. He stated (id. at 8199):

> "So, when we say, 'Although you discovered the fraud within a month or within 6 months after it was committed, you have to bring suit within a year, or you cannot bring it at all,' we actually limit rather than encourage litigation. Otherwise, the man

> could go on until the end of 5 years, although he had known about the fraud all the time, and still bring his suit."

These statements negative any notion that the limitation was to be satisfied by a form of notice indicating nothing more than that claims up to several million dollars might be brought at some indefinite time in the future. A statement by Senator Barkley (78 Cong. Rec. at 8201) shows that mere notice of the possibility of suit was deemed insufficient.

> "If he discovers the fraud 1 month after it is committed, should there not be a reasonable limitation upon his power to hold over the opposite party for 5 or 6 years *the possibility of a suit?* Should we not require him to *bring the suit* within a reasonable time after he discovers that he has been defrauded . . .?" (emphasis added)

The colloquy of Senators Kean and Norris on the same amendment shows the concern of the Senate to prevent undue delay in bringing suit by investors who wish to speculate on a rise in the market (78 Cong. Rec. 8199).

The decision of the Court below gives the investor precisely that power which the one-year discovery provision was designed to take away—the ability to wait quiescent for an indefinite period of years, considering suit, but neither suing nor being barred from suit. In the present case the one-year statute of limitations has already been tolled, according to the ruling below, for a period of two and one-half years, and an additional year or more of this tolling is in prospect.

The majority opinion below, although purporting to rest largely upon reasons of policy, never came close to ascer-

taining the actual purposes and policies underlying the one-year limitation in § 13. The opinion rested its analysis of underlying policy on the statement of this Court in *Order of R. R. Telegraphers* v. *Railway Express Agency, Inc.*, 321 US 342, 348-49 (1944), describing the purpose of statutes of limitation in general to prevent prosecution of claims after evidence has been lost and memories have faded. The majority opinion below reasoned that this purpose was satisfied in the present case because the filing of action by the original nine plaintiffs made defendants "aware of the nature of the evidence that would be needed at the trial" regarding the issue of misrepresentation (340 F.2d at 733, 734, App. A pp. 4, 6). This statement itself is, of course, not accurate with respect to the varying positions of individual purchasers, e.g. as to their respective times of discovery. However, general discussions of the kind found in the *Telegraphers* case, where a six-year state statute of limitations was under consideration, are of virtually no use in making any accurate assessment of the policies underlying the one-year limitation in § 13.

A one-year limitation is unusually short and represents unique policy considerations. With reference to such a short statute the statement of this Court in *Midstate Horticultural Co.* v. *Pennsylvania R. R. Co.*, 320 US 356, 367 (1943) is particularly apt:

> "The paramount policy . . . is to secure promptness in collection."

This statement was directed to the two- and three-year limitations in § 16 of the Interstate Commerce Act, which the Court considered "of short duration" (320 US at 361) and which the Court held could not be extended even by express agreement of the parties. The Court's decision applies with even greater force to the one-year limitation in § 13 of the Securities Act.

The legislative history of § 13 reinforces what is implicit in the statute itself—that the one-year period was not primarily intended to avoid claims made after evidence was lost and memories had faded. The predominant purpose was to require unusual diligence on the part of the potential plaintiff as a price for the drastic new remedy afforded by the Securities Act, and also to allow directors and other prospective defendants to know at an early date the amount of claims against them. For instance, Senator Byrnes stated (78 Cong. Rec. 8200):

> "Looking at the matter from the standpoint of the director of a corporation, one [purpose] was that we should bring to an end his fear, or the fear of his estate, of a suit.
>
> "... [F]rom the standpoint of the director, the more quickly he knows whether or not he is liable, the better. Therefore, within a year I can file a suit and then I can continue to negotiate and try to arrange a settlement."

Senator Byrnes pointed out the importance of the early cut-off of claims in order to permit settlement of a director's estate in case of death (*ibid.*).

This Congressional purpose—to create a definite and early cut-off of claims upon which directors and others can rely—is completely defeated by the ruling below which gives great numbers of investors an unlimited time within which to sue.

(b) The Use of Rule 23 (a) (3) to Toll the One-year Limitation of § 13 Violates the Express Will of Congress.

This Court has recently stressed that a limitation provision attached to a Federal remedial statute can be tolled only if such tolling represents faithful compliance with

Congressional intent. *Burnett* v. *New York Central R. R. Co.*, 33 US *Law Week* 4298 (April 5 1965); *Midstate Horticultural Co.* v. *Pennsylvania R. R. Co.*, 320 US 356, 360 (1953).

What is said above about the language of the statute and the legislative history rebuts any idea that Congress intended to have the one-year statute of limitations tolled for an indefinite period, whether by reason of Civil Rule 23(a)(3) or otherwise.

Two additional considerations demonstrate the tolling theory to be a drastic violation of Congressional purpose. These are (1) the purpose to have the limitation period uniform in the various courts where suit may be brought (both State and Federal), which would be defeated by allowing various procedural rules to effect a tolling; and (2) the express prohibition in 28 USC § 2072 against use of the Civil Rules to abridge substantive rights.

1. *In Burnett* v. *New York Central R. R. Co.*, 33 US Law Week 4298, 4300-1 (1965) this Court emphasized that "a major reason" for Congress providing its own statute of limitations, where jurisdiction over a Federal cause of action is concurrent in both State and Federal courts, is to achieve uniform limitation of actions in these various jurisdictions. See also *Engel* v. *Davenport*, 271 US 33, 39 (1926).

Section 22 of the Securities Act, like the FELA jurisdictional provision involved in *Burnett* and *Engel*, provides for action in both Federal and State courts and provides that a State court action may not be removed to a Federal court. Under the teaching of these two cases there must be recognized as one of the principal purposes of Securities Act § 13 an intent to require uniformity with regard to limitations. Such uniformity would be impossible if the limitations were to be tolled or extended by virtue of

the various procedural rules relating to class actions and interventions applicable in the Federal courts and in the various State courts.[3]

2. No stronger expression of Congressional purpose against the tolling of § 13 limitations by Civil Rule 23(a)(3) can be found than in the express mandate of the Enabling Act of the Civil Rules (28 USC § 2072) that these rules "shall not abridge, enlarge or modify any substantive right". A decision that the pendency of a spurious class action tolls the statute of limitations would "abridge", "enlarge" and "modify" substantive rights. In the few pertinent cases decided prior to the enactment of the Civil Rules the courts held that spurious class actions did not toll the statute of limitations. *Rockwell* v. *Junction City,* 92 Kans. 513, 141 Pac. 299 (1914); *Mason* v. *Chicago,* 163 Ill. 351, 45 NE 567 (1896). Rule 23(a), which governs class actions, was intended to clarify and restate the practice pertaining to class actions under Equity Rule 38 and could not work substantive changes in that practice. See Report of Advisory Committee on Rules for Procedure, p. 58 (1937).

Rights under the statute of limitations in § 13 are in the clearest sense substantive and intended to be fixed and certain so that corporate directors and other prospective defendants may rely on them in the disposition of their affairs. This Court has succinctly described the proper province of procedural rules as matters of "housekeeping". *Hanna* v. *Plumer,* 33 US Law Week 4331, 4334 (April 27 1965).

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[3]For instance Delaware provides for class actions in precisely the same terms as Federal Rule 23. See Del. Chancery Rule 23. By contrast, Illinois does not allow class actions of the spurious type—where the only unifying element is a common question of law or fact. *Otto* v. *Alexander,* 383 Ill. 482, 50 N. E. 2d 511 (1943); *Hintze* v. *Allen,* 326 Ill. App. 182, 193-94, 61 N. E. 2d 259, 263 (1945); Note to Illinois Civ. Pr. Act § 52.1.

Procedural rules are properly limited to matters of court process and administration. *Sibbach* v. *Wilson & Co.*, 312 US 1, 14 (1941), *United States* v. *Sherwood*, 312 US 584 (1941). The statute of limitations in § 13 is obviously far different from what this Court has denominated procedural.

Under the command of the Enabling Act, § 13 substantive rights cannot be changed by any civil rule. Yet the Court below in order to "give full recognition" to Rule 23(a)(3) has decided that the one-year limitation can be tolled after the commencement of a class action under that Rule, and that suit within one year from discovery is thereafter waived as to great numbers of potential plaintiffs. We note that neither the majority opinion nor the minority opinion below devotes one word to the effect of the Enabling Act. Its mandate has been brushed aside with a resultant violation of both this Federal statute and Securities Act § 13.

II.

THE LOWER COURT DECISIONS HAVE BEEN IN CONFLICT

This Court has never decided the question here presented—*i.e.* the effect of a Rule 23(a)(3) class action upon the statute of limitations contained in the Securities Act of 1933. Except for the decision below no Court of Appeals has ruled on the question.

Before the present case two District Courts had reached opposing conclusions on the question. There had also been a decision and some dictum regarding the effect of a "spurious" class action upon other statutes of limitations.

The correct treatment of the problem, we submit, is contained in *Athas* v. *Day*, 161 F. Supp. 916 (D. Col. 1958) and *P. W. Husserl, Inc.* v. *Newman*, 25 F. R. D. 264 (S. D. N. Y. 1960). In *Athas* the Court applied the bar of § 13

of the Securities Act to prevent certain interventions and stated (p. 919) that

> ". . . each plaintiff must be able to avoid the bar of the statute of limitations without reference to the other causes of action."

In *Husserl* the Court stated (p. 267) that

> ". . . reliance upon the commencement of the action should not free the claims of the absentees from the statutory bar. . . . The complaint stands as a formal invitation for participation by persons 'similarly situated', but is an invitation which requires timely responses."

The contrary authorities, including the decision of the Court below, have sprung principally from the dictum of Judge Frank in *York* v. *Guaranty Trust Co.*, 143 F. 2d 503, 529 (2d Cir. 1944)[4] that the bringing of a spurious class action should be allowed to toll limitations because otherwise absent members of the class will be trapped. See *Union Carbide and Carbon Corp.* v. *Nisley*, 300 F. 2d 561 (10th Cir. 1961), *cert. dismissed on consent*, 371 US 801 (1962) (involving the Clayton Act limitation); *Deckert* v. *Independence Shares Corp.*, 39 F. Supp. 592 (E. D. Pa. 1941), *rev'd. on other grounds*, 123 F. 2d 979 (3rd Cir. 1941) (§ 13 of the Securities Act).

Sufficient answer to the "trap" argument is found in Judge Friendly's concurring opinion in the present case which points out the various reasons for the weakness of the *York* dictum as authority, including the fact that Judge

[4]That was a decision by a divided court which was reversed in this Court on the ground that the doctrine of laches was erroneously applied and that the New York statute of limitations governed and required dismissal of the action, 326 US 99.

Frank's statement had as its principal object the problem of laches rather than the matter of statutes of limitations (340 F. 2d at 735; App. A, pp. 9-10). Judge Friendly also rejected the trap theory as a matter of principle recognizing that it is simply unrealistic. For instance, in the present case, there is no reason to believe that any of the intervenors actually relied upon the commencement of this action or postponed their own legal action because of it. Indeed in the papers submitted below there is not one word by any of the intervenors claiming delay in reliance upon this action.

Thus two lines of authority have begun to grow up in the Federal courts. What is of prime importance is that the *York* dictum and its progeny have completely failed to approach the problem by an accurate appraisal of the purposes and policies underlying the relevant statutes of limitation. *York* was, of course, speaking principally of laches, without attention to any specific statute of limitations. In *Union Carbide* and in the decision below, the matter of Congressional intent was either ignored completely or was subordinated to what the Court conceived of as promotion of a procedural rule. At no time have these decisions made the careful and faithful analysis of Congressional intent which alone can properly determine whether a statute of limitations is to be tolled. *Burnett* v. *New York Central R. R. Co.*, 33 US Law Week 4298 (April 5, 1965, Oct. Term 1964, No. 437).

CONCLUSION

The error of the Court below thus raises important questions of Federal law which deserve decision and reversal by this Court The decision below has seriously misinterpreted Section 13 of the Securities Act and has failed to follow here the mandate of 28 USC § 2072 and of the

decisions declaring that procedural rules and devices cannot abridge substantive rights. No minor impairment of the statutory right is here involved, but rather a complete revision of the statutory scheme by means of a superimposed tolling for indefinite periods of the time limited by the statute. Review by certiorari should therefore be had.

Respectfully submitted,

RALPH M. CARSON
Attorney for Petitioners Drexel & Co., Hemphill, Noyes & Co., Paine, Webber, Jackson & Curtis, Salomon Brothers & Hutzler, Peter Morgan & Company, Blair & Co. Incorporated and G. H. Walker & Co.
1 Chase Manhattan Plaza
New York, N. Y. 10005

New York
May 12 1965

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 260—September Term, 1964.
(Argued December 16, 1964 Decided January 18, 1965.)
Docket No. 29261

BARRY ESCOTT, and others,
Plaintiffs,

—v.—

BARCHRIS CONSTRUCTION CORPORATION, and others,
Defendants-Respondents,

GEORGE HALL, and others,
Intervenors-Appellants.

Before:

FRIENDLY, HAYS and MARSHALL,
Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Sylvester J. Ryan, *Chief Judge,* denying a motion to intervene in an action brought under Section 11 of the Securities Act of 1933, 15 U. S. C. § 77k, on the ground of the statute of limitations, contained in Section 13 of the Securities Act of 1933, 15 U. S. C. § 77m.

Reversed.

Appendix A

WM. FRANCIS CORSON, New York, N. Y. (Garey & Garey, Allan K. Peckel, of counsel), *for Appellants.*

RALPH M. CARSON, New York, N. Y. (Thomas P. Griesa, of counsel, Davis, Polk, Wardwell, Sunderland & Kiendl; Ferris, Bangs, Davis, Trafford & Syz; Emmet, Marvin & Martin; Olwine, Connelly, Chase, O'Donnell & Weyher; Milbank, Tweed, Hadley & McCloy; Sims & Friedman; Mullane & Moukad), *for Appellees.*

JACK FRIEDMAN, New York, N. Y. (Theodore R. Schreier, Leonard Sims, of counsel, Sims & Friedman), *for Appellees Vitolo, Russo and Pugliese.*

MAX SCHOENGOLD, New York, N. Y. (Schoengold & Sporn), *for Appellee Birnbaum.*

PHILIP A. LOOMIS, JR., General Counsel, Securities and Exchange Commission, Washington, D. C. (David Ferber, Solicitor, Michael Joseph, Attorney, SEC), *as Amicus Curiae.*

HAYS, *Circuit Judge*:

This action was brought under Section 11 of the Securities Act of 1933, 15 U. S. C. § 77k by certain holders of debentures of the Barchris Construction Corporation, in behalf of themselves and others similarly situated to recover damages for a false registration statement. Another twenty-four debenture-holders have moved to intervene in the action as additional parties plaintiff. The motion to intervene was denied in the district court on the ground that the pro-

posed interveners were barred by the statute of limitations contained in Section 13 of the Securities Act of 1933. We reverse this determination.

Section 13 is codified as 15 U. S. C. § 77m which, in relevant part, provides:

> "No action shall be maintained to enforce any liability created under section 77k . . . . of this title [Section 11] unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, . . . In no event shall any such action be brought to enforce a liability created under section 77k . . . of this title more than three years after the security was bona fide offered to the public."

For the purposes of this appeal we must assume that the action brought by the original plaintiffs herein was brought within the prescribed time. The sole question which we have to decide is whether the proposed interveners are barred because, although the original action was timely brought, the motion to intervene was made more than one year after the proposed interveners discovered or should have discovered the falsity of the registration statement.

A literal reading of the statute supports the view that its requirements have been satisfied since the only action with which we are concerned was brought within the statutory period. There is no attempt here to bring or maintain any action after the one year limitation.

But, it is argued, since the proposed interveners could not now bring new actions they are barred from asserting their claims in the pending action although the statute had

not run on their claims when the pending action was instituted.

The answer to this argument is to be found in the representative character of the pending action. That action was brought as a "class action" under the provisions of Rule 23 of the Federal Rules of Civil Procedure. It falls squarely within the terms of Rule 23(a)(3) since there are questions of law and fact which are common to all the claims asserted. In fact the question of the falsity of the registration statement is almost certain to be the real issue in the litigation. The theoretical possibility of having to try that issue thirty-five hundred times, once for each of the $1000 bonds, of the total issue of $3,500,000 and the practical possibility of trying it several times (there are now twenty-nine plaintiffs claiming $469,661.75; the addition of the proposed interveners would bring that figure to fifty-three claiming $531,214.60) demonstrate the desirability of providing for a representative action in which the issue of falsity need be tried only once. The Advisory Committee's Note on the proposed amendment to Rule 23 suggested that the kind of situation we have here, "a fraud perpetuated [perpetrated] on numerous persons by the use of similar misrepresentations," is an "appealing situation for a class action."[1] The obvious desirability of avoiding a multiplicity of actions turns us toward favoring the representative suit and encouraging its use.

In our complex modern economic system where a single harmful act may result in damages to a great many people there is a particular need for the representative action as

[1]Committee on Rules of Practice and Procedure of the Judicial Conference of the United States Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts, p. 107 (1964).

a device for vindicating claims which, taken individually, are too small to justify legal action but which are of significant size if taken as a group. In a situation where we depend on individual initiative, particularly the initiative of lawyers, for the assertion of rights, there must be a practical method for combining these small claims, and the representative action provides that method. The holders of one or two of the debentures involved in the present action could hardly afford to take the risk of an individual action.[2] The usefulness of the representative action as a device for the aggregation of small claims is "persuasive of the necessity of a liberal construction of . . . Rule 23." *Weeks* v. *Bareco Oil Co.*, 125 F. 2d 84 (7th Cir. 1941); and see, generally Kalven and Rosenfield, The Contemporary Function of the Class Suit, 8 Univ. of Chi. L. Rev. 684 (1941).

If we are to give full recognition to the representative character of the action we must hold that the statute of limitations is tolled for those in whose behalf the representative action is brought as well as for those who actually bring the action.[3] "If a class action is maintainable as such, it is incongruous to say that the absent members, who are represented by those present, may not rely upon the commencement of the action by their brethren to toll the running of the statute." *Union Carbide and Carbon Corporation* v. *Nisley*, 300 F. 2d 561, 590 (10th Cir. 1962), appeal dismissed 371 U. S. 801 (1963).

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[2]The present price of the debentures does not appear in the record, but it does appear that at one time a thousand dollar bond was selling for thirty dollars.

[3]Of course such an action can be brought only in behalf of those who have valid claims at the time the action is instituted. A class action cannot have the effect of reviving claims which are already barred by the statute.

If we turn on the other hand to the position of the defendants, we find nothing in the purpose or policy of the statute of limitations which would be defeated by holding that the statute was tolled by the bringing of the class suit. In *Order of R.R. Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342, 348-49 (1944) the Supreme Court said:

> "Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until the evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them."

In the present case the claims were not allowed to grow stale. Before the period of limitations had expired an action was instituted. The defendants were thus made aware of the nature of the evidence that would be needed at the trial. Since the action was brought on behalf of all others similarly situated, the defendants were put on notice of the possibility of claims aggregating the full sales price of all the debentures. There can have been no occasion for surprise when these additional plaintiffs sought to intervene.

Judge Frank, speaking for our court, said in *York* v. *Guaranty Trust Co. of New York*, 143 F. 2d 503, 529 (2d Cir. 1944), reversed on other grounds, 326 U. S. 99 (1945):

> "As to suits under (3), no less than those under (1) or (2), the Rule [23] unequivocally tells all

> persons having claims of the type therein described that one or more of them may begin such a class action 'on behalf of all' when the 'class' is 'so numerous as to make it impracticable to bring them all before the court.' Any non-accepting noteholders, relying on that assurance, were justified in believing that plaintiff's suit was begun on their behalf although they were not before the court. To hold that such noteholders cannot, as to lapse of time, have the benefit, by intervention, of the institution of the suit by plaintiff would be to convert the Rule into a trap."

The defendants argue that there is no trap because if the court decides that the statute is not tolled, the parties in whose "behalf" the action was brought have no right to depend upon that action for the protection of their claims against the running of the statute. This result is said to arise from the maxim "Ignorance of the law is no excuse." But of course Judge Frank was not talking about the law but about the practical realities of the situation. Whatever the law is declared to be, it would still be true that claimants, hearing that an action had been brought on their "behalf," would believe that they did not themselves have to act in order to keep the statute of limitations from running. While the argument may not be dispositive it is certain that the existence of a representative action which does not have the effect of tolling the statute does constitute a trap.

Thus all arguments based upon policy appear to favor permitting the applicants to intervene. Turning to authority we find that the only appellate authority that there is

on the point supports the proposed interveners' position. The two relevant cases are *Union Carbide and Carbon Corporation* v. *Nisley, supra,* in the Tenth Circuit, and *York* v. *Guaranty Trust Co. of New York, supra,* in our own Circuit. Misapplied ingenuity may find it possible to distinguish *York* on the facts, so that what Judge Frank thought of as his holding can be classified as dictum. It seems to us that the opinion in *York* is highly persuasive, if not binding.

Reversed.

FRIENDLY, *Circuit Judge* (concurring):

While I concur in the judgment of reversal, the combination of some ambiguity in the pertinent statute, 15 U. S. C. § 77m, with the unsatisfactory character of F. R. Civ. P. 23(a)[1] makes the case more difficult for me than it is for my brothers.

A number of the considerations advanced in the court's opinion seem rather inconclusive. Thus, I cannot see how the undoubted utility of the spurious class action in avoiding a multiplicity of trials of the same issue calls for the grant of intervention after the statute of limitations would bar an independent action by the proposed intervenors; if economy of judicial time were the only consideration, denial would provide even more. Neither is it altogether clear that prolonging the period for intervention makes the bringing of the class action more attractive to the spon-

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[1]See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendment to Rules of Civil Procedure for the United States District Courts 98-99 (1964).

sors. Although this will increase the recovery and the attendant fees if the action succeeds, it will also tempt potential intervenors to stay on the side lines and watch the progress of the game, and thus place on the initial plaintiffs a heavier current and possibly ultimate burden. The argument that initiation of the action gives notice to the defendants to get their evidence on the issues into shape meets most of the statutory policy outlined in *Order of R.R. Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342, 348-49 (1944), but not quite all of it. Even on appellants' view, one litigable issue is whether the would-be intervenors had, or should have, discovered the untrue statement or omission more than one year before the date when the action was instituted, see fn. 3 to the court's opinion, and memories on this many "have faded, and witnesses have disappeared," if the intervention is too long postponed. Similar considerations may apply to proof of damages, and to defenses individual to a particular plaintiff. Agreeing with my brother Hays that defendants' answer to Judge Frank's "trap" argument, *York* v. *Guaranty Trust Co.*, 143 F. 2d 503, 529 (2 Cir. 1944), rev'd on other grounds, 326 U. S. 99 (1945), is unrealistic, I think the argument itself is equally so when it is invoked on behalf of intervenors not shown to have known of the class action before the statute ran as to them.

The authorities on which the court relies are not so strong as they might appear. It is indeed profitless to argue whether "dictum" or "holding" best characterizes Judge Frank's statement in *York* that a spurious class action tolls the statute of limitations for later intervenors. What is clear is that the intervenors in question were not before the court and that the statement was initially framed without

benefit of argument from counsel. See Appellee's Petition for Rehearing, pp. 19-20. While the question was raised on rehearing, the Court's attention at that time undoubtedly centered on the quite different problems that led Judge A. N. Hand to withdraw his concurrence, see 143 F. 2d at 529-31, and the Supreme Court later to reverse. Moreover, despite the breadth of Judge Frank's language, the precise issue under the view of the majority in *York* was laches, erroneously believed to be the applicable principle, and not a statute of limitations. *Union Carbide and Carbon Corp.* v. *Nisley,* 300 F. 2d 561 (10 Cir. 1961), was decided over a powerful dissent by Judge Pickett, and a stipulation for dismissal of a petition for certiorari, 371 U. S. 801 (1962), prevented possible Supreme Court review.

With no truly pertinent legislative history called to our attention, we are thus left with little more than the words of § 13 of the Securities Act, very likely set down without any thought of such a legal curiosity as the spurious class action, then relatively little known. See 3 Moore, Federal Practice ¶ 23.10[2] (2d ed. 1964). The words do favor the appellants, as Judge Hays' opinion shows. Yet one may wonder how far Congress realized it was saying something different than, e.g., "No person may maintain a claim arising out of a violation of [the pertinent sections] unless he brings an appropriate proceeding to enforce such claim within" etc., where the language would tend in the other direction. Still the words are what they are, and I see no sufficient reason for refusing to follow them when they lead to no untoward results.

But one ought not press too far. One necessary limitation is indicated in fn. 3 to the court's opinion. Moreover, our holding does not compel us to follow Judge Frank's

"suggestion" in *York* and the Tenth Circuit's decision in *Nisley* that persons barred from initiating actions on their own behalf were to be allowed to intervene in spurious class actions at any time prior to final judgment.

Judge Frank himself owned that his suggestion "does not apply to a jury case after the trial has concluded, for it would involve a new hearing of the evidence by the jury." *Bascom Launder Corp.* v. *Telecoin Corp.*, 204 F. 2d 331, 336 (2 Cir.), cert. denied, 345 U. S. 994 (1953); I would be inclined to extend that limitation to any trial or to a successful motion by the plaintiffs for summary judgment. See 3 Moore, *supra*, ¶ 23.13, at 3476.[2] Finally I would limit decision to the particular statute of limitations here before us; on so close an issue, relatively slight differences in wording or policy or legislative history might demand a different result. Hopefully the necessity for such difficult determinations may be avoided by revision of Rule 23, see fn. 1 *supra*.

[2]I am speaking only of persons barred by limitations from starting actions on their own account; different considerations might apply to persons not so barred who could rely on the judgment by way of collateral estoppel. Cf. *Zdanok* v. *Glidden Co.*, 327 F. 2d 944, 954-56 (2 Cir.), cert. denied, 377 U. S. 934 (1964).

APPENDIX B

Decision of District Court

Endorsement

62 Civ. 3539

In this suit filed by bondholders to recover damages for an alleged false registration statement (Sec. 11 Securities Act of 1933, 15 USCA 77k), 25 movants have asked for leave to intervene as party-plaintiffs and to serve a proposed Third Amended Complaint. (Rule 23(a)(3) F.R.C.P.)

Defendants oppose on the ground that would-be plaintiffs have failed to show in their complaint that they come within the one-year limitation contained in Sec. 13 of the Act (15 USCA 77m). In the alternative, defendants ask that intervention, if granted, be conditioned on the posting for security for costs and attorneys' fees in the aggregate amount of $15,000, or on the posting of security in the amount of $250 by each of the non-resident movants (Local Civil Rule 2, S.D.N.Y.).

We assume (and defendants do not question) that the timely filing of this motion, with the proposed complaint annexed, within the 3-year limitation provided by Section 13 is tantamount to a timely filing of the complaint itself, with respect to that limitation. The real issue here is the one-year limitation, arising from the individual plaintiff's knowledge or duty to acquire knowledge of the fraud claimed not more than one year prior to filing suit. Though the suit be maintained as a class suit, under Rule 23(a)(3) it is brought to enforce several rights and each plaintiff must be able to avoid the bar of the limitation based on his knowledge without reference to the other suits filed or the

knowledge of the other suitors (*Athas* v. *Day*, 161 F. Supp. 916). The limitation is a part of the right created; it is an essential ingredient of the claim asserted and must be affirmatively pleaded (*Newberg* v. *American Dryer Corp.*, 195 F. Supp. 345). A general averment that none of the plaintiffs discovered the untrue statements and omissions and could not have discovered them "more than one year prior to the date of the commencement of this action" (as is alleged in the original complaint) relates only to the plaintiffs named in the first complaint. Whether a relation back to the date of the original filing for the benefit of subsequent intervenors is justified where the statute of limitations is not bound up with knowledge or duty to have such knowledge (3 Moore, Fed. Practice Secs. 23.10 and 23.12, 1963 ed.), it cannot be justified where such relation back would substitute one plaintiff's knowledge for all subsequent plaintiffs and effect an abrogation of the statutory one-year limitation. A rule shall not abridge, enlarge or modify a substantive right. Sec. 2072, Title 28 U.S.C.

That plaintiffs recognize this requirement in their pleading is evident from the fact that they have so pleaded (although in very general terms) with respect to all prior plaintiffs who sought to intervene by the filing of the first and second amended complaints. In fact, a reading of the carefully drawn Paragraph "15" of the Proposed Third Amended Complaint leaves the impression that the omission to allege lack of knowledge or duty to acquire such knowledge on the part of these would-be intervenors within one year from the filing of this motion is deliberate, rather than the result of oversight in pleading. However that may be, the requirement that they so aver, if able to do so, is in the statute; leave will be given plaintiffs to file with this Court a further

amended complaint within 15 days alleging as to these plaintiffs, if they so elect, that none of them discovered or should have discovered the fraud alleged more than one year prior to the date of the filing of this notice of motion. Upon their doing so, leave to intervene will be granted; unless this be done, leave to intervene will be denied.

The permission to file such an amended, third amended complaint and to intervene is, of course, without prejudice to any defense of the statute of limitations; and any pre-trial discovery relevant to such defense (though not so limited) which defendants may see fit to conduct. And it is not to be construed as any indication that the bar of the statute has been met by the movants or by any of the plaintiffs.

In the event plaintiffs are given leave to intervene under the above conditions, they will not be required to post security—either under Section 11-e of the Act (15 USCA 77K(e)) or under Local Civil Rule 2. Should defendants be vindicated and the Court find the suit to have been without merit, they may be awarded costs even in the absence of any bond. A suit involving nationwide issue of securities is not one in which the Court's discretion should be exercised to require a bond from non-resident plaintiffs.

Entry of an order on this decision on the motion to intervene is reserved, pending submission of a further proposed complaint with the requisite allegations.

So ordered.

SYLVESTER J. RYAN
U.S.D.J.

Dated: July 27, 1964.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

BARRY ESCOTT, and others,

Plaintiffs,

v.

BARCHRIS CONSTRUCTION CORPORATION, and others,

Defendants-Respondents,

GEORGE HALL, and others,

Intervenors-Appellants.

Petition for Rehearing

Davis Polk Wardwell Sunderland & Kiendl, New York, N. Y., for appellees Drexel & Co., et al.

Petition for rehearing by panel denied.

H. J. F.
P. R. H.
T. M.
U.S.C.JJ.

FEB 15 1965

APPENDIX D

[Caption]

Petition for Rehearing In Banc

Davis Polk Wardwell Sunderland & Kiendl, New York, N. Y., for appellees Drexel & Co., et al.

No active circuit judge having requested that the case be reheard in banc, the petition is denied.

J. Edward Lumbard
Chief Judge

FEB 15 1965

APPENDIX E

Securities Act of 1933

Section 11, 15 U.S.C. § 77k

§ 77k. *Civil liabilities on account of false registration statement.*

(a) In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in

such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

(b) Notwithstanding the provisions of subsection (a) of this section no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof—

(1) that before the effective date of the part of the registration statement with respect to which his liability is asserted (A) he had resigned from or had taken such steps as are permitted by law to resign from, or ceased or refused to act in, every office, capacity, or relationship in which he was described in the registration statement as acting or agreeing to act, and (B) he had advised the Commission and the issuer in writing that he had taken such action and that he would not be responsible for such part of the registration statement; or

(2) that if such part of the registration statement became effective without his knowledge, upon becoming aware of such fact he forthwith acted and advised the

Commission, in accordance with paragraph (1) of this subsection, and, in addition, gave reasonable public notice that such part of the registration statement had become effective without his knowledge; or

(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of an expert, and not purporting to be a copy of or extract from a report or valuation of an expert, and not purporting to be made on the authority of a public official document or statement, he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading; and (B) as regards any part of the registration statement purporting to be made upon his authority as an expert or purporting to be a copy of or extract from a report or valuation of himself as an expert, (i) he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or (ii) such part of the registration statement did not fairly represent his statement as an expert or was not a fair copy of or extract from his report or valuation as an expert; and (C) as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or

extract from a report or valuation of an expert (other than himself), he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement of the expert or was not a fair copy of or extract from the report or valuation of the expert; and (D) as regards any part of the registration statement purporting to be a statement made by an official person or purporting to be a copy of or extract from a public official document, he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue, or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement made by the official person or was not a fair copy of or extract from the public official document.

(c) In determining, for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a prudent man in the management of his own property.

(d) If any person becomes an underwriter with respect to the security after the part of the registration statement with respect to which his liability is asserted has become effective, then for the purposes of paragraph (3) of

subsection (b) of this section such part of the registration statement shall be considered as having become effective with respect to such person as of the time when he became an underwriter.

(e) The suit authorized under subsection (a) of this section may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: *Provided,* That if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) of this section for damages in excess of the

total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

(f) All or any one or more of the persons specified in subsection (a) of this section shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

(g) In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public. (May 27, 1933, ch. 38, title I, § 11, 48 Stat. 82; June 6, 1934, ch. 404, § 206, 48 Stat. 907.)

Section 22, 15 U.S.C. 77v

§ 77v. *Jurisdiction of offenses and suits.*

(a) The district courts of the United States, and the United States courts of any Territory, shall have jurisdic-

tion of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this subchapter brought by or against it in the Supreme Court or such other courts.

(b) In case of contumacy or refusal to obey a subpena issued to any person, any of the said United States courts, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(c) No person shall be excused from attending and testifying or from producing books, papers, contracts, agree-

ments, and other documents before the Commission, or in obedience to the subpena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying. (May 27, 1933, ch. 38, title I, § 22, 48 Stat. 86; June 25, 1936, ch. 804, 49 Stat. 1921; June 25, 1948, ch. 646, § 32 (b), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Aug. 10, 1954, ch. 667, title I, § 11, 68 Stat. 686.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 134

DREXEL & CO., and others,

Petitioners,

v.

GEORGE HALL, and others,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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New York, June 8, 1965.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1160

DREXEL & Co., and others, *Petitioners,*

v.

GEORGE HALL, and others, *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Question Presented

When a class action has been timely brought, may members of the class join that action by intervention, even though the applicable statute of limitations would prevent them from instituting a separate action?

Statement

It is Respondents' position that the institution of a class action, if timely brought, complies with the statute of limitations for all members of the class. The action having been brought on behalf of the entire class, any member of the class who subsequently becomes a plaintiff by intervention is deemed to have brought his action at

the time of the commencement of the class action. We do not contend that the statute has been so "tolled" that another independent action could be started without compliance with the statutory time limitation.

The phrase "tolling of the statute of limitations" as used in discussions of class actions does not have its usual meaning. Ordinarily "tolling" of the statute of limitations takes place before an action is commenced, and in the usual sense what is meant by "tolling of the statute of limitations" is that the period within which the action may be commenced is enlarged. When used in its present context the phrase "tolling of the statute of limitations" does not mean that the period within which the action may be commenced is enlarged, but only that if a class action was timely brought, members of the class for whose benefit it was brought may later intervene.

Throughout the writings on the subject of class actions the expression "tolling of the statute of limitations" has been used with the above connotation. For the purpose of consistency of expression, we will also use it herein with that meaning.

Objections to Petitioners' Statement of the Case

On page 5 of Petitioners' brief it is stated that there is no evidence that other security holders were associated in any way with the nine (original plaintiffs) or that the nine had any authority to represent any security purchasers other than themselves. This is an incorrect statement. All of the security holders have a relationship to each other in that all purchased their securities after the alleged false registration statement was filed and after the alleged false prospectus was disseminated.

They are all purchasers under a single registration statement of a single issue of debentures of the BarChris Construction Corporation represented by a single Trustee under a single Trust indenture. All are members of a single, clearly identifiable class. The authority of the original plaintiffs to act on behalf of the class is found in Rule 23.

Speaking of this action, Judge Hays, below, 340 F. 2d 731, 733, said:

> "It falls squarely within the terms of Rule 23(a)3 since there are questions of law and fact which are common to all the claims asserted. In fact the question of the falsity of the registration statement is almost certain to be the real issue in the litigation. * * * The Advisory Committee's Note on the proposed amendment to Rule 23 suggested that the kind of situation we have here, 'a fraud perpetrated on numerous persons by the use of similar misrepresentations,' is an 'appealing situation for a class action'."[1]

The original plaintiffs and the Respondents cannot be said, as Petitioners' urge, to be without association of any kind when they are: all purchasers of the same security issued under the same allegedly false Registration Statement; are victims of the same fraud; and, are all present or former holders of a single debenture issue. (*Weeks* v. *Bareco Oil Co.*, 125 F. 2d 84, 7th Cir. 1941; Multi-Party Litigation in the Federal Courts, 71 Harv. Law Rev. 874, 934-936.)

On page 6 of Petitioners' brief, statements are made that it is an essential allegation of the proposed third

1. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts, page 107 (1964).

amended complaint that those who seek intervention have not discovered, or by reasonable diligence could not discover, the falsity in the registration statement more than one year prior to the date of *the motion to intervene.* This is inaccurate. All that intervenors must establish is that the falsity in the registration statement was not, or could not reasonably have been, discovered more than one year prior to the date of the *commencement of the action.*

Reasons for Denying the Writ

The decision below is not in conflict with any decision of any court of appeals. It is not in conflict with state or territorial law. It does not raise a question which need be settled by this court. The decision below is not in conflict with any decision of this court; nor has it so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this court's power of supervision.

The decision below has not abrogated the statute of limitations contained in Section 13 of the Securities Act of 1933.

Argument

None of the usual reasons for review on certiorari are present in this case.

(a) No state court has decided a federal question which has not been decided by this Court, or decided a federal question in a way not in accord with the decisions of this Court.

This is a federal court action brought under a federal statute (Section 11 of the Securities Act of 1933). We know of no state court decisions on the question here

involved and consequently believe that there are no state court decisions with which this Court need be concerned.

(b) The court below, in deciding this case is not in conflict with the decisions of any courts of appeal in other circuits.

As Judge Hays pointed out, at page 734 of the opinion below, there are only two other circuit court decisions on the subject and they are both consistent with the determination below:

> "Turning to authority we find that the only appellate authority that there is on the point supports the proposed intervenors' position. The two relevant cases are Union Carbide and Carbon Corporation v. Nisley, supra, in the Tenth Circuit, and York v. Guaranty Trust Co. of New York, supra, in our own Circuit. Misapplied ingenuity may find it possible to distinguish York on the facts, so that what Judge Frank thought of as his holding can be classified as dictum. It seems to us that the opinion in York is highly persuasive, if not binding."

There is no conflict of opinion between circuit courts which this court need resolve.

The Petitioners recognize that all of the appellate authority is against them. Therefore, again using "misapplied ingenuity" Petitioners try to show disparity of district court decisions. Differences in decisions in district courts even if they broadly existed, would give no ground for certiorari to the Supreme Court.

The only case to which Petitioners point which gives them any support is *Athas* v. *Day* (161 F. Supp. 916, D. Col. 1958), which was cited to the court below without provoking comment. It should be noted that the Court of Appeals which decided *Union Carbide and Carbon* v.

Nisley, 300 F. 2d 561 (10th Cir. 1961) discussed *Athas* v. *Day* then decided directly to the contrary. The case of *Husserl, Inc.* v. *Newman* (25 FRD 264, S. D. N. Y. 1960) referred to in the Petition, at page 19, is clearly distinguishable as the court in that case held intervention was timely and granted leave to intervene.

(c) No important state or territorial question has been decided in a way which is in conflict with applicable state or territorial law.

This case is brought under a federal statute to enforce rights of investors. It does not involve any state or territorial law.

(d) There is no important question involved of federal law which has not been, or should be, settled by this Court.

York v. *Guaranty Trust Co.*, 143 F. 2d 503, *rev'd on other grounds*, 326 U. S. 99, the *Union Carbide* case, and now this case, constitute a threesome of consistent decisions of circuit courts of appeal which settles the question.

Furthermore, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has presented a Preliminary Draft of Proposed Amendments to the Rules of Civil Procedure for the United States District Court (34 FRD 385). Among the rules which it is proposed be clarified is Rule 23. If Rule 23 is amended any decision in this case would no longer be authority and accordingly there is no reason for this Court to accept this case for review. As Judge Friendly, in his concurring opinion below, said:

> "Hopefully, the necessity for such difficult determinations may be avoided by revision of Rule 23. See FN. 1 supra." (340 F. 2d 731, 736)

Inasmuch as there are three consistent decisions of Courts of Appeal and a pending proposal to amend Rule 23, there would seem to be no reason why this Court should consider this matter for the purpose of "settling" the law.

The revision of Rule 23 which is now proposed, would clarify the rule in a manner consistent with the decision below.

(e) There has been no decision below in conflict with applicable decisions of ths Court.

To our knowledge this Court has never spoken on the question involved and consequently the decision below cannot be in conflict with decisions of this Court.

(f) The decision below has not so far departed from the usual and accepted course of judicial proceeding as to call for the exercise of this Court's power of supervision.

The Securities and Exchange Commission was permitted to intervene below. The Commission supported the contentions of the Respondents and urged upon the court the decision which it made as being consistent with the purposes and policies of the securities laws.

If one or more persons institute a class action to enforce the liability under Section 11 of the Securities Act before the expiration of the statute of limitations, there is no sound reason why every member of the class should not thereafter be permitted to join that action even though the time for him to individually sue might have expired. The evidence on which the intervenors will rely to establish the falsity in the registration statement is only as old as that upon which the original parties will rely, and claims of additional parties will not upset the expecta-

tions of the defendants. The original action was brought on behalf of a defined and identifiable class and accordingly the defendants were then advised of the full extent of their possible liability. (See 76 Harvard Law Review, 1675-1679.)

The policies in favor of settling the claims of the entire class in a single litigation argue for considering this class action to be sufficiently representative in nature to "toll" the statute for the entire class. If each individual member of a class must bring independent suit in order to protect his claim against the running of the statute of limitations, his remedy may well be denied him.

The Securities Acts are remedial legislation and as such should be liberally construed to fully effectuate and eliminate the practices they were calculated to destroy.

Unless a liberal construction is given, not only to the cause of action given under Section 11 of the Securities Act, but also to the remedy created, a shelter will be erected for those who defraud investors.

By holding the class suit remedy to be available in actions such as the one at bar, and by holding that the statute of limitations is "tolled" by the institution of such an action, the purposes of the Securities Acts are best accomplished.

By and large, the vast majority of issuers of securities, and those who distribute them to the public, are meticulous in their disclosures. The national, commercial and industrial life is greatly dependent upon the maintenance of a securities market in which all can have confidence. The liberal construction of the securities laws not only aids the individual investor in the enforcement of his remedies, but aids in bringing to the general securities market the integrity which is essential to its effective functioning.

The decision below has not abrogated the statute of limitations. Respondents have never contended that they have been excused from complying with the statute of limitations. On the contrary, they state that they have complied with the statute by the timely institution of the class action on their behalf. The court below has not, as the Petitioners state, excused the intervenors from compliance with the statute of limitations.

No substantive right has been abridged, enlarged or modified as the Petitioners contend. The Petitioners have distorted the use of the word "tolling" to give the impression that the decision below has in some way changed the limitation periods contained in Section 13. This is not so. The court below has only held that these provisions were met by the timely institution of a class action. In order to give full recognition to the representative character of the action they hold that the statute of limitations is "tolled" for those in whose behalf the representative action is brought just as it is for those who actually brought it. This is not an abrogation, modification, or abridgement of any substantive right nor is it a tolling of the statute as the word is ordinarily used.

Whether the limitation provision in §13 of the Securities Act of 1933 is considered to be substantive or procedural, the Respondents' position is that it has been *met* by the institution of the action on behalf of the class. The rule is the same for the original plaintiffs and those who by intervention later become plaintiffs. Each must comply with the statute by establishing that he did not know, and by the exercise of reasonable diligence could not have discovered, the alleged falsity of the registration statement more than one year prior to the date of *the commencement of the action.*

The statutory limitation is not in any way, or to any extent, abrogated. All plaintiffs, including plaintiff-intervenors, will have to prove compliance with the time limitation in §13. However, they need only do so as of October 25, 1962, when the action was started and not as of May 13, 1964, when they sought to intervene.

There is nothing in the legislative history of Section 13 of the Securities Act which indicates that the decision of the court below is in any way contrary to Congressional intent.

Conclusion

For the reasons stated above, the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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New York
June 8, 1965

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IN THE

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OCTOBER TERM, 1964

No. 134

DREXEL & CO., and others,
Petitioners,

v.

GEORGE HALL and others,
Respondents.

PETITIONERS' REPLY BRIEF

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New York, June 30, 1965

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

DREXEL & Co., and others,
Petitioners,
v.
GEORGE HALL and others,
Respondents.

No. 1160

PETITIONERS' REPLY BRIEF

Respondent's Brief is devoted in large part to possible grounds of certiorari not listed in our petition. We reiterate the ground on which we seek review. It is that under the ruling below the class action procedure is allowed to be used as a device to prolong far beyond the statutory one-year period the time in which security purchasers are required to take legal action under the Securities Act of 1933. The question is of wide-spread importance because (1) the class action device is potentially involved in the great majority of suits under the Securities Act, and (2) the class action procedure has been given such an effect by the Court below as to virtually nullify the Congressional plan of limitations, including the Congressional purpose to have uniform limitations in the Federal and State courts, which have concurrent jurisdiction over suits under the Securities Act.

I.

According to the respondents, the matter is very simple. If a class action is brought this means that the whole class is in the action and has done whatever is necessary to comply with the applicable statute of limitations.

Although this argument may have a surface glitter, it is completely divorced from the realities of Securities Act litigation. It was on the basis of these realities, rather than abstract theory, that a trial judge of great experience, Chief Judge Ryan, rejected the argument of *en masse* compliance with the one-year limitation in Securities Act § 13 and held that to allow an indefinite and unlimited right of intervention in a class action initiated by a few investors would "effect an abrogation of the statutory one-year limitation." (App. B p. 13).

What is it that really occurs when a class action is brought under the Securities Act? In the first place the so-called "class" of potential plaintiffs will seldom be a unified and "clearly identifiable" group of the kind respondents blandly describe (brief pp. 2-3). Certainly there is no such thing in the present case. The so-called class of persons having potential claims on a particular registration statement will consist of all persons who ever bought the security involved. This includes not only those who purchased at the time of the original issue and those holding the securities at the time suit is commenced, but also all the people in between who have bought and sold any of the securities. How many of these people there are, who they are, where they are located, which of them will desire to sue, and which will not desire to sue, are all facts unknown to the initiators of the so-called class action as well as to the prospective defendants.

The plaintiffs' attorney will, of course, name in the complaint only those who have actually authorized suit; as to the others he will insert some allegation phrased as broadly and generally as possible to the effect that suit is brought on behalf of everyone "similarly situated". Under these circumstances, necessarily typical of a "class suit" involving an issue of securities, the insertion of the class

suit allegation is nothing more than a kind of speculation by a plaintiffs' attorney that some others *may* join in addition to those who have actually authorized suit.

Is the commencement of a class suit under these circumstances the equivalent of *commencement of action by all members of the class?* Of course not. None of the authorities cited by respondents, and none we have ever seen, suggests that persons who are absent and unidentified, whose causes of action are independent, and who may or may not wish to sue, become parties to an action simply because some handful of investors insert in *their* complaint a boiler-plate clause invoking remedies on behalf of all.

Professor Moore has properly described a class action brought under these circumstances as "merely an invitation to joinder—an invitation to become a fellow traveller in the litigation, which may or may not be accepted." 3 *Moore's Federal Practice* p. 3443. However, as far as a statute of limitations is concerned, such a suit should be regarded as "an invitation which requires timely responses". *P. W. Husserl, Inc.* v. *Newman,* 25 FRD 264, 267 (SDNY 1960).

The commencement of such a class action not only fails to bring absent investors in as parties; it also fails to give defendants any real notice as to what claims will be made. Defendants are given no idea as to which ones and how many, out of this great mass of unknown persons, will actually sue. Thus defendants are given no real notice within the statutory period of the amount of their probable liability, and are given no opportunity to prepare evidence affecting the *individual* claims.

Respondents emphasize, as did the majority opinion below, that it is desirable to have plaintiffs in a Securities Act case join forces in one action instead of bringing numerous individual actions. This was the main thrust of

the argument of the Securities and Exchange Commission in the Court below. Such a contention is completely beside the point. There is nothing in Judge Ryan's ruling which interferes in the least with the bringing of a class action or the consolidating of individual claims in one action. However, it is unquestioned that any investors who wish to obtain the benefits of a class action must join it and assert their individual claims at some point. All that Judge Ryan required, and all that we contend for, is that persons who intend to join such an action do so within the time prescribed by Congress.

The issue involved here is not a narrow technical point. The ruling of the Court below provides a device by which the great majority of the potential plaintiffs in most Securities Act cases can have an indefinite period of time—far more than one year from the time of their discovery of the facts—during which they may sue or not as they choose. From a practical standpoint the one-year limitation of § 13 is destroyed if the ruling below is permitted to stand.

II.

Respondents contend (brief pp. 6-7) that because of a "threesome of consistent decisions of Circuit Courts of Appeals" nothing needs to be settled by this Court and in any event decision by this Court would have no utility in view of the proposed revision of Rule 23.

There is no threesome of Court of Appeals decisions on the point involved. The *Union Carbide* case, 300 F.2d 561 (10th Cir. 1961), *cert. dismissed on consent,* 371 U. S. 801 (1962), did not involve the Securities Act at all but dealt with the four-year limitation period in the Clayton Act. Moreover, the class in that case involved a specific group of persons whose names appeared in the records of

defendants. The decision is not authority for holding that absent and completely unidentified investors in a public issue of securities can comply with the Securities Act statute of limitations through a general allegation in a complaint that a suit is brought on behalf of everyone similarly situated.

As to the *York* case, 143 F.2d 503, 529 (2d Cir. 1944) Judge Friendly (App. A pp. 9-10) pointed out its weakness as authority on the question here involved in that the decision turned on the doctrine of laches.

If the question here involved is not now settled by this Court, further controversy is clearly foreshadowed not only by the conflict in certain District Court decisions (petition pp. 18-19), but by the concurring opinion of Judge Friendly below which criticizes practically every point in the majority's decision.

The question cannot be passed off as lacking importance simply because a revision in Rule 23 has been proposed. The problems inherent in a class action being brought where a substantial portion of the so-called class is unknown and unidentified would still be presented under whatever new Rule is finally adopted. No device we can think of will avoid the basic problem in this case; *viz.* how is the statute of limitations *as a defense of substantive law* to be applied in a class action when security purchasers, previously unidentified and not parties, attempt to enter the action after the running of the limited period?

Moreover, the question decided by the Court below is of unusual importance even with a view to the cases now pending, which will need to be decided under the present rule regardless of whether an amendment is made. The Administrative Office of the Federal courts informs us that as of December 31 1964 there were pending 595 cases

in the category "Securities, Commodities and Exchanges" and we are advised by that office that most of these cases are ones under the Securities Act. Of the cases in the above category, 295 had been filed in 1964.

The possible revision of Rule 23 will also fail to solve the problem raised by the ruling below with regard to uniform limitations in the State and Federal courts, which have concurrent jurisdiction under the Securities Act. The holding that the § 13 one-year limitation can be tolled by a procedural rule inevitably means that application of the limitation will vary depending upon whether suit is brought in a State or Federal court and will vary from state to state according to local procedures. Uniformity, regarded by this Court as one of the most important purposes underlying a Congressionally created statute of limitations (*Burnett* v. *New York Central R. R.*, 33 US Law Week 4298, 4300-1), cannot be achieved if the application of the statute of limitations can be varied in accordance with the procedural rules of the particular jurisdiction. This basic and important problem will remain regardless of whether Federal Rule 23 is amended.

III.

Conclusion

The Fifth Circuit Court of Appeals, following this Court's decision in *Sibbach* v. *Wilson & Co.* 312 US 1, has reiterated that rule-making cannot modify substantive law in holding that Rule 25(a)(1) is not a statute of limitations. *Perry* v. *Allen* 239 F.2d 107, 111-2 (1956). To abridge substantive rights through Rule 25, said the Court, "is outside the mandate and inside the caveat of the Act of Congress" (28 USC § 2072).

Whatever the form of a revised Rule 23 the present problem of adjusting substantive rights to procedural forms will persist in the important context of Securities Act legislation. The present is the right occasion for resolution of the problem.

Respectfully submitted,

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New York, June 30 1965